1990

City of St. George v. Olsen : Brief of Appellee

Utah Court of Appeals

Connie L. Mower; Attorney for Appellant.
Theodore W. Shumway; Gary G. Kuhlmann; Attorneys for Respondent.

IN THE UTAH COURT OF APPEALS

CITY OF ST. GEORGE,	)	
	)	
Plaintiff/Appellee,	)	
	)	
vs.	)	Case No. 900143-CA
	)	
JASEN RALPH OLSEN,	)	Priority No. 2
	)	
Defendant/Appellant.	)	

BRIEF OF APPELLEE

Response to an Appeal from Final Judgment
and Conviction of the Fifth Circuit Court
of Washington County, St. George Department
and Denial of a New Trial

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Attorneys for Respondent

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Sec. 5-2-14(3), St. George City Code

For a licensee or any employee or agent of a licensee to sell, furnish, dispose of, give, or cause to be sold, furnished, disposed of or given to a person under the age of twenty-one (21) years, or for a person under the age of twenty-one (21) years to buy, receive, have in possession or consume, beer or any alcoholic beverage.

Sec. 32A-12-13, St. George City Code as adopted

1. It is unlawful for any person under the age of 21 years to purchase, possess, or consume any alcoholic beverage or product, unless specifically authorized by this title.

2. It is also unlawful for any person under the age of 21 years to misrepresent their age, or for any other person to misrepresent the age of a minor, for the purpose of purchasing or otherwise obtaining an alcoholic beverage or product for a minor.

Sec. 41-2-133, St. George City Code as adopted

It is a Class B misdemeanor for a person to:

1. display or cause or permit to be displayed or to have in possession any license knowing it is fictitious or has been cancelled, revoked, suspended or altered;

2. lend or knowingly permit the use of a license issued to him, by a person not entitled to it;

3. display or represent as his own a license not issued to him;

4. fail or refuse to surrender to the division upon demand any license which has been suspended, canceled, or revoked;

5. use a false name or give a false address in any application for a license or any renewal or duplicate of the license, or to knowingly make a false statement, or to knowingly conceal a material fact or otherwise commit a fraud in the application; or

6. permit any other prohibited use of a license issued to him.

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STATEMENT OF JURISDICTION

Pursuant to Utah Code Annotated, Sec. 78-2a-3(2)(d), the Utah Court of Appeals has jurisdiction over appeals from the Circuit Court. However, there is a question as to that jurisdiction with respect to certain issues raised in this appeal due to proceedings by the Defendant in the Circuit Court with respect to, and following the filing of, his notice of appeal.

PRELIMINARY STATEMENT

The Defendant was charged with possession or consumption of alcoholic beverages by a minor, misrepresentation of age by a minor for the purpose of purchasing alcoholic beverages, and possession of a fictitious identification, all in violation of the St. George City Code. The Defendant pled not guilty to such charges and was tried in absentia before the Fifth Circuit Court of Utah, St. George Department, on February 5, 1990. The Defendant was found guilty of the three offenses charged and was ordered to pay fines in the total sum of $455.00. The Defendant filed a Notice of Appeal on or about March 6, 1990.

ISSUES PRESENTED FOR REVIEW

1. Whether this Court lacks jurisdiction to consider issues raised by the Defendant's Motion for New Trial based upon the

failure of the Notice of Appeal to specify an appeal from the denial of such motion.

2. Whether the Defendant's Notice of Appeal allows this Court to consider the trial court's denial of the Motion for new Trial, or whether this Court is precluded from considering matters raised by the Defendant's Motion for New Trial.

3. Whether this Court has jurisdiction over any issues raised by the Defendant's Motion for Reconsideration of the denial of his *Motion for New Trial when it was filed after his Notice of Appeal.*

4. Whether the trial court properly denied the Defendant's motion to continue the trial and properly proceeded with a trial in absentia where the Defendant knew of the trial date, knew of the charges against him, and had communicated to the prosecutor the Defendant's intentional and voluntary waiver of his appearance and plea of guilty to Count I of the Information.

5. Whether the trial court properly denied the Defendant's Motion for New Trial based upon the Defendant's knowledge of the charges against him, opportunity to appear at trial, and failure to appear at trial.

6. Whether the evidence presented at trial supports the trial court's finding that the Defendant was guilty of the charges against him as contained in the Information.

7. Whether the Defendant can properly be convicted of misrepresentation of age for the purpose of purchasing alcoholic beverages as well as unlawful possession or consumption of alcoholic beverages, both in violation of the St. George City Code.

STATEMENT OF THE CASE

Although the Statement of the Case and Statement of the Facts presented by the Defendant is slanted in his favor, the City accepts such Statement of the Case and Statement of the Facts with the following facts added.

1. At the time that the Defendant was issued the citation on November 24, 1989, the Defendant signed the citation and received a copy thereof. The citation clearly sets forth three charges against the Defendant. (R. 1).

2. On or about December 15, 1989, the Defendant filed a Request for Discovery with the City. (R. 5,6) The City responded to the discovery request on December 21, 1989, and as part of such response, provided the Defendant with a copy of the police report which clearly shows that the Defendant was cited for three offenses. (R. 8, Response to Request No. 5).

3. The City prosecutor first talked with Defendant's attorney on the morning of February 5, 1990, the day of the trial. (Tr. p.3 l.6-8; R. 28) Defendant's counsel had previously left messages

with the City prosecutor's office, failing, however, to indicate the reason for the call or what she was calling about. During the conversation on February 5, 1990, the City prosecutor indicated that he did not have the Defendant's file in front of him and that he was not familiar with the case. (Tr. p.3 l.8-10; R. 28) The Defendant's counsel discussed the matter with the City prosecutor and after the prosecutor refused to dismiss or modify the charge of minor in possession or consuming, an agreement was reached that the Defendant would plead guilty to that charge. (Tr. p.3 l.13-20; R. 28, 29) At the time of this discussion the City prosecutor was not aware that the Defendant had been charged with three separate offenses. (Tr. p.3 l.23-24; R. 31)

4. At the time of the conversation on February 5, 1990, Defendant's counsel was also not aware that the Defendant had three charges against him. (Defendant's Response to Motion for Summary Disposition at page 3.) No discussion of the charges other than minor in possession or consuming occurred during the February 5, 1990 conversation. (Tr. p.3 l.8-24)

5. On February 15, 1990, the Defendant filed a Motion for New Trial based solely upon the Defendant's claim that he did not knowingly or intentionally waive his right to appear for trial. (R. 17) The motion was denied on February 20, 1990. (R. 25) On March 8, 1990, the Defendant filed his Notice of Appeal. (R. 32)

Subsequent to filing of the Notice of Appeal, the Defendant on March 29, 1990, filed a Motion for Reconsideration with respect to the Motion for New Trial. (R. 41) The Motion for Reconsideration was denied on April 9, 1990. (R. 52, 53)

SUMMARY OF ARGUMENTS

The Defendant has failed to properly perfect issues for appeal to this Court. The Defendant's Notice of Appeal is limited to the judgment entered against the Defendant on February 5, 1990. Thus, issues raised with respect to the denial of the Motion for New Trial are not before the Court. As the Defendant filed his Notice of Appeal prior to filing his Motion for Reconsideration of the Motion for New Trial, any issues raised by the Motion for Reconsideration are likewise not before this Court. Finally, as the Defendant failed to raise questions as to the sufficiency of evidence, double jeopardy and denial of a continuance with the trial court at the time of filing the Motion for New Trial, and did not raise such issues at trial, such issues are not preserved for consideration herein.

Should the Court find that there are issues regarding the trial court's judgment, such judgment should be sustained as the trial court did not abuse its discretion by refusing to continue the trial or in proceeding with the trial in absentia where the

Defendant knew of the trial date and his need to appear and voluntarily failed to do so. Likewise, should the Court find that issues raised by the Defendant's Motion for New Trial are properly before this Court, the Court should find that the trial court did not abuse its discretion in denying the Defendant a new trial based upon the Defendant's knowledge and actions in failing to appear at trial.

Finally, based upon the plain reading of the statutes under which the Defendant was charged, this Court should sustain the trial court's finding that the Defendant is guilty of both possession or consumption of alcoholic beverages by a minor and use of false identification for the purpose of purchasing alcoholic beverages. The elements necessary to prove these offenses are distinct and one is not a lesser included offense of the other.

ARGUMENT

A. The Defendant's Actions with Respect to Filing His Motion for New Trial, His Notice of Appeal and His Motion for Reconsideration, Bring This Court's Jurisdiction Into Question.

A question regarding this Court's jurisdiction and scope of review is raised by the Defendant's Notice of Appeal. Rule 3(d) of the Utah Rules of Appellate Procedure requires that a notice of appeal designate the judgment or order, or part thereof, appealed

from. The purpose of a notice of appeal is to advise the opposing party that an appeal has been taken from a specific judgment or order in the case. Additionally, a "Respondent is entitled to know specifically which judgment is being appealed." Hunley v. Stan Katz Real Estate, Inc., 15 Utah 2d 126, 388 P.2d 798,800 (1964)(Appeal dismissed where notice of appeal designated wrong judgment). The rule that an appeal is limited to the matter designated in the notice of appeal has been widely followed. See Wendling v. Southwest Savings and Loan Association, 143 Ariz. 599, 694 P.2d 1213 (Ariz. Ct. App. 1984), Lee v. Lee, 133 Ariz. 118, 649 P.2d 997 (Ariz. Ct. App. 1982), Jiminez v. Jiminez, 55 Or. App. 221, 637 P.2d 928 (1981), Collins v. Union Federal Savings and Loan Association, 624 P.2d 496 (Nev. 1981), Mabrey v. Mobil Oil Corp., 84 N.M. 272, 502 P.2d 297 (1972), Welch v. State, 390 P.2d 35 (Nev. 1964), and State v. Reed, 190 Kan. 376, 375 P.2d 588 (1962).

In this case, the Defendant's Notice of Appeal indicates only that the appeal is from "that judgment and conviction rendered against [Defendant] on the 5th day of February, 1990." Thus, Defendant is limited herein to presenting issues relating to the judgment of the trial court and is precluded from raising issues regarding the denial of the Motion for New Trial.

Should the Court determine that the Defendant may properly question the trial court's denial of the Motion for New Trial, a

review of such issues should be limited. On February 15, 1990, the Defendant filed a Motion for New Trial with the trial court. the only issue raised as a basis for seeking a new trial was the Defendant's failure to appear at trial. The Defendant claimed the right to a new trial based upon his claim that he did not knowingly or intentionally waive his right to a be present at trial. The trial court, finding that the Defendant was aware of the three charges against him, and noting that plea bargains are not legally effective unless approved by the court, denied the motion.

It is well established that in the absence of exceptional circumstances, an appellate court will not review matters raised for the first time on appeal where no timely and proper objection was made in the trial court. State v. Steggell, 660 P.2d 252, 254 (Utah 1983). See also State v. Pacheco, 778 P.2d 26, 29 (Utah Ct. App. 1989), State v. Chancellor, 704 P.2d 579, 580 (Utah 1985), and, especially, State v. Smith, 776 P.2d 929 (Utah Ct. App. 1989) wherein it was also noted that this Court would not review issues for the first time on appeal which had not been raised in the trial court through a motion to arrest judgment. Id. at 931, f.n.1. Finally, in Brigham v. Moon Lake Electric Association, 24 Utah 2d 292, 470 P.2d 393 (1970), the court stated "No motion for a new trial was made by plaintiff, and so the trial court was not given the opportunity to correct the verdict rendered by the jury. An

appellate court ought not to do that which was not requested of the trial court." Id. at 396.

In this case, the only issue raised by the Defendant through his Motion for New Trial dealt with whether he had knowingly and intentionally waived his right to be present at trial. Based upon such limited request and the above case law, if the denial of the Motion for New Trial is to be reviewed at all, this Court should limit its review to no more than the issue of the Defendant's failure to appear at trial and should not address the sufficiency of the evidence and other issues raised by Defendant in his brief.

As a final matter of jurisdiction, it should be noted that the Defendant, after filing his Notice of Appeal filed a Motion for Reconsideration of the Motion for New Trial. The trial court denied the motion noting that there was no provision for rehearing on the Motion for New Trial and that the Motion for Reconsideration was not timely as a motion for new trial. It has been held that an untimely Motion for Reconsideration has no effect upon the finality of the judgment rendered by the trial court or the running of time for an appeal. Transamerica Cash Reserve Inc. v. Hafen, 723 P.2d 425, 426 f.n.2 (Utah 1986). Additionally, it has been held that a trial court is without power to alter its prior ruling upon the filing of a motion for reconsideration which is, in essence, the same motion for new trial. State v. McMullen, 764

P.2d 634 (Ut. Ct. App. 1988). Thus, should this Court determine that it has jurisdiction over this appeal despite the problems set out above, any matters considered by the trial court or raised by the Defendant with respect to the Motion for Reconsideration are not properly within the Court's jurisdiction on this appeal.

B. The Trial Court Properly Denied the Defendant's Motion to Continue the Trial Made at the Commencement of Trial.

After the Court had scheduled four arraignment dates for the Defendant between November 27, 1989 and December 15, 1989, the Defendant's counsel entered a plea of not guilty on December 18, 1989. On January 11, 1990, a notice setting trial for February 5, 1990 was sent to the parties. On the morning of trial Defendant's counsel contacted the City prosecutor to discuss the case. At such time, it appears that neither the City prosecutor nor Defendant's counsel were aware that three charges were pending against the Defendant. During their conversation the Defendant's counsel agreed to transmit to the City prosecutor a signed waiver and entry of plea of guilty to the charge of minor in possession or consuming. Later that afternoon, and prior to trial, the City informed the office of Defendant's counsel of the other pending charges. The secretary to Defendant's counsel requested that the City seek a continuance of the trial. At the commencment of trial, the Defendant's request for continuance was communicated to the court. The court, after reviewing the file and the Defendant's

failure to appear at the prior arraignments, denied the continuance. The Defendant now argues that the court's failure to grant the continuance was erroneous since the Defendant did not voluntarily absent himself from the trial.

> It is well established in Utah, as elsewhere, that the granting of continuances is at the discretion of the trial judge, whose decision will not be reversed by this court absent a clear abuse of that discretion. State v. Moosman, Utah, 542 P.2d 1093 (1975). Abuse may be found where a party has made timely objections, given necessary notice and made a reasonable effort to have the trial date reset for good cause. Griffiths v. Hammon, Utah, 560 P.2d 1375 (1977).

State v. Creviston, 646 P.2d 750, 752 (Utah 1982).

The facts presented to the trial court at the time of the request for continuance certainly justified the court's exercise of discretion in denying the continuance. The record revealed that the Defendant had failed to appear, for various personal reasons, at several arraignments. The Defendant had received notice of the trial, had received a copy of the citation setting forth the charges against him, during the discovery process had received a copy of the police report setting forth the three charges against him, and an information has been filed against him setting forth the three charges. No contact was made by the Defendant with the City prosecutor until shortly before trial. It is obvious that the Defendant did not intend to appear at the time of trial since

telephone contact was made on the morning of trial from an attorney in Salt Lake and the trial was being held in St. George.

Rule 17 of the Utah Rules of Criminal Procedure provides that a defendant has a right to appear and defend in person and by counsel in all cases. The Defendant is to be personally present at the trial except that in prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to the defendant of the time for trial will not prevent the case from being tried, and a verdict or judgment entered therein has the same effect as if defendant had been present.

Despite the Defendant's claims, it is clearly evident that the Defendant here received notice of the date and time for trial. The Defendant's failure to appear was based simply upon the fact that he had entered what he thought to be a plea arrangement with the City. However, the Defendant knew that more than one charge was involved, and he should not be allowed to rely upon his failure to deal with all three charges as grounds for claiming his non-appearance was not voluntary. This is not a case where the Defendant's counsel advised him that the trial would not go forward or did not advise him of the trial date. Rather, the burden was placed on the Defendant, the person knowing the charges against him, to be present at trial or otherwise deal with the charges.

The Defendant's reliance on the discussed plea arrangement as a basis for not attending the trial should not be found to justify his non-appearance. Plea bargains between the parties are not binding until approved by the court. Rule 11, Utah Rules of Criminal Procedure. Thus, the arrangement between counsel was simply a proposal to be made to the court and, obviously, if the court had denied the plea bargain, the trial would be held as scheduled. Despite this, the Defendant and his counsel took upon themselves the risk of non-appearance and should now be held to such actions.

C. The Trial Court Properly Denied the Defendant's Motion for A New Trial Based Upon the Circumstances of the Case.

Should this Court find it proper to review the trial court's denial of the Defendant's Motion for New Trial, such denial should be upheld. The decision to grant or deny a new trial is a matter of discretion with the trial court and such decision will not be reversed absent a clear abuse of discretion. State v. Williams, 712 P.2d 220, 222 (Utah 1985). In the case at hand, the Defendant filed his motion for new trial based solely upon the grounds that he did not knowingly or intentionally waive his right to appear for trial. In support of the motion for new trial the Defendant's counsel submitted an affidvait setting forth her involvement in this case and the conversations which she had with the City prosecutor. The affidavit states that on or about December 15,

1989 the Defendant advised her that he was scheduled for arraignment on his criminal charges that day. Defendant's counsel then filed a written plea of not guilty to the charges. Thus, it appears that the Defendant clearly knew that there was more than one criminal charge pending against him. The affidavit further sets forth that the Defendant's attorney received notice of the February 5, 1990 trial some time subsequent to December 15, 1989. Yet, as has been set forth herein, the City prosecutor's first conversation with the Defendant's counsel was on the day of trial.

The right of a criminal defendant to appear and defend in person at all stages of trial may be waived by the defendant's voluntary absence from trial. State v. Glenny, 656 P.2d 990,991 (Utah 1982). Voluntariness is determined by considering a totality of the circumstances. State v. Wagstaff, 772 P.2d 987, 990 (Utah Ct. App. 1989). In cases where it is argued that the defendant was not voluntarily absent from trial, "it is generally held that the defendant cannot by his voluntary act invalidate the proceedings." State v. Ross, 655 P.2d 641, 642 (Utah 1982). In Wagstaff, supra, this Court, citing State v. Aikers, 87 Utah 507, 51 P.2d 1052, 1056 (1935), noted:

> It is not only the right of the defendant to be present, but is a duty which the statute imposes upon him, and he usually will not be permitted to take advantage of his own misconduct when he has voluntarily absented himself from the trial. It is one thing

> for him to absent himself when he is at liberty and can voluntarily do so, and quite another thing for the court to deprive him of any substantial right against his protest . . .
>
> A defendant is entitled to be safeguarded in every constitutional right, but should not be permitted to so juggle with such rights as to embarrass and delay the courts or to defeat the ends of justice.

Wagstaff, 772 P.2d at 990.

Nothing in the Motion for New Trial indicates any agreement between the parties with respect to the three charges pending against the Defendant. The Defendant does not assert that the City in any way agreed to dismiss two of the charges based upon the Defendant's plea of guilty to possession of alcohol by a minor. Thus, had the Defendant wished to contest the other charges he was required to appear at trial. However, the Defendant made no effort to appear at trial and, indeed, with respect to Count I, voluntarily, knowingly and intentionally waived his right to appear at such trial. Nothing in the Motion for New Trial cited deficiencies in the evidence or other causes for the granting of a new trial. The trial court reviewed the evidence and denied the Motion for New Trial since the Defendant was aware from the citation that three charges were pending and since plea bargains are not legally effective until approved by the court. Such a find was not an abuse of discretion under the circumstances.

D. The Evidence Produced At Trial Was Sufficient to Establish the Guilt of the Defendant on the Charges Against Him.

Should the Court find that the Defendant has properly reserved for appeal the question of the sufficiency of evidence at trial, this Court should find that the evidence is sufficient to uphold the trial court's judgment. "When challenging the findings of fact of the trial court on appeal, the appellant must show that the findings of fact were clearly erroneous. In order to show clear error, the appellant must marshall all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support against an attack." State v. Moosman, 135 Utah Adv. Rep. 28 (Utah 1990). In reviewing the trial courts judgment, "the function of this court 'is not to determine guilt or innocence, the weight to give conflicting evidence, the credibility of witnesses, or the weight to be given defendants testimony.'" State v. Gorlick, 605 P.2d 761, 762 (Utah 1979). Rather, where the sufficiency of the evidence is challenged, this court will:

> Review the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict. State v. Petree, 659 P.2d 443 (Utah 1983). "When there is any evidence including reasonable inferences that can be drawn from it, from which findings of all the requisite elements

> of the crime can be reasonably made, [the Court] inquiry stops, and [the Court] sustain[s] the verdict." State v. Gehring, 694 P.2d 599, 600 (Utah 1984).

State v. Udell, 728 P.2d 131, 132 (Utah 1986). The Court will not substitute its judgment for that of the trier of fact, State v. Sparks, 672 P.2d 92, 93 (Utah 1983), overruled on other grounds, State v. Ossana, 739 P.2d 628, 631 (Utah 1987), and the verdict will not be overturned unless there is a clear showing of lack of evidence or that the evidence is so inconclusive or inherently improbable that reasonable minds could not reasonably believe the defendant had committed a crime. State v. Gabaldon, 735 P.2d 410, 412 (Utah Ct. App. 1987). See also State v. Bergwerff, 777 P. 2d 510, 511 (Utah Ct. App. 1989).

The Defendant herein claims that the evidence at trial was insufficient to (1) prove that the crimes occurred in St. George and (2) prove the Defendant's culpability for possession of a false identification.

The City does not dispute that as part of its case, it must prove that the Defendant possessed or consumed alcoholic beverages, and used a false identification to purchase alcoholic beverages, within the boundaries of the City. Indeed, such was proven at trial. In reviewing the facts and inferences presented to the trial court in the light most favorable to the findings of that court, it is evident that the findings were not clearly erroneous.

At trial, the officer testifying on behalf of the City stated that he observed the Defendant in the parking lot of a 7-11 located at Dixie Downs Road and Sunset. The Defendant was running across the parking lot carrying a sack and cans of beer were spilling out of the sack onto the parking lot. The Defendant jumped into a vehicle which then pulled out onto Sunset in an eastbound direction. The officer immediately made a traffic stop at that location. (Tr. p.5 l.13-15, 21-p.6 l.16).

The intersection of Dixie Downs Road and Sunset lies within the boundaries of the City of St. George. A vehicle traveling eastbound on Sunset is traveling toward the City Center. This would be clearly evident to the judge hearing the case since he has been a resident of this area for many years. The judge certainly could appropriately take judicial notice of the locations testified to as being within the boundaries of the City of St. George. See Rule 201, Utah Rules of Evidence, State v. Campbell, 500 P.2d 801, 805 (Mont. 1972), State v. Phillips, 102 Ariz. 377, 430 P.2d 139, 142 (1967). It is also clearly evident from the facts presented that the Defendant was in possession of alcohol at the location where the officer observed and stopped him.

The testimony establishes that the Defendant was a minor. (Tr. p.7 l. 19-22). As the Defendant stepped out of the vehicle, he tossed an identification card with his picture on it onto the

ground under the truck. (Tr. p.6 l.21-p.7 l.1). The identification card had a date of birth on it indicating that he was over 21 years of age. (Tr. p.7 l. 1-4). The Defendant admitted to the officers that he had used the identification card to purchase beer (Tr. p.8 l.6-9) at a location up the road (Tr. p.11, l.1-5, 10-13). The evidence further presented indicated that the Defendant had been drinking or was intoxicated (Tr. p. 8, l. 13-15; p. 10, l. 5-13).

Based upon the evidence presented to the court and properly taking notice as to the locations discussed, the court determined "it appears abundantly clear from the evidence that the Defendant is guilty of all three charges and I find him guilty of all three counts." (Tr. p.12, l. 5-7). The evidence and inferences viewed in the light most favorable to the verdict clearly establish that the evidence was sufficient to find the Defendant guilty of the charges against him.

E. The Doctrine of Double Jeopardy Does Not Bar A Conviction of the Defendant for Both Misrepresentation of Age and Possession or Consumption of Alcohol by a Minor.

The Defendant argues that the doctrine of double jeopardy prohibits the Defendant in this case from being convicted of both possession or consumption of alcohol by a minor and misrepresentation of age for the purpose of purchasing alcohol by a minor. The Defendant argues that the ordinances under which the

Defendant was charged makes a minor in possession or consumption of alcohol a lesser included offense of misrepresentation of age by a minor for the purpose of purchasing alcohol. Should the Court determine that this issue was properly reserved for appeal by the Defendant, the Court should find that the conviction of the Defendant on both counts was proper. A review of the ordinance, and the state statute from which it is derived, reveals that no jeopardy bar exists. A reading of the ordinance establishes that the two acts are distinct and constitue grounds for separate convictions. Sec. 32A-12-13 of the St. George City Code as adopted states that it is unlawful for a minor to possess or consume alcoholic beverages. The Ordinance then states "(2) it is also unlawful for any person under the age of 21 years to misrepresent their age for the purpose of purchasing . . . an alcoholic beverage or product". (emphasis added) The plain and common meaning of the word "also" as used in the ordinance is "besides; in addition to; too." Websters Ninth New Collegiate Dictionary, 1989. Thus, the ordinance provides that in addition to it being unlawful for a minor to possess or consume alcoholic beverages, it is also unlawful for a minor to misrepresent his age for the purpose of purchasing alcoholic beverages.

Obviously a minor may possess or consume alcoholic beverages without using a false identification to purchase them. Equally,

a minor may present a false identification for the purpose of purchasing alcoholic beverages without ever being in possession of or consuming alcoholic beverages. Different elements must be proved in order to convict a defendant under the separate provisions. Nothing in the ordinance or the fact that the ordinances operate in conjunction with each other, would evidence that one of the sections is a lesser included offense of the other. Since the ordinance supports separate offenses and separate convictions, the Defendant was properly convicted of both offenses and can be fined with respect to each.

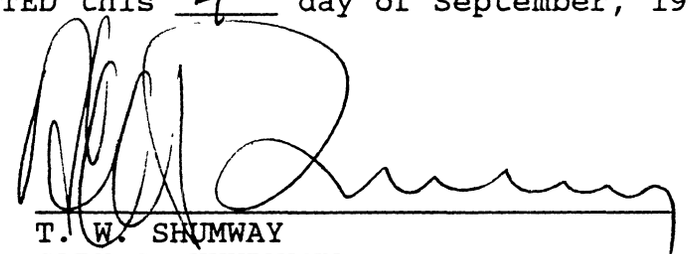
CONCLUSION

The Defendant's limited Notice of Appeal, limited Motion for New Trial and actions in the trial court subsequent to the filing of the Notice of Appeal defeat this Court's jurisdiction over this appeal. However, should this Court find jurisdiction over the original appeal, it is evident from the facts presented and the arguments made herein that the trial court properly exercised its discretion in denying the Defendant's motion to continue the trial and properly proceeded with the trial in absentia based upon the Defendant's knowledge of the charges against him, knowledge of the trial date, and voluntary absence from the trial. No one precluded the Defendant from appearing at the time of trial and the decision

not to appear was wholly that of the Defendant based upon knowledge of the circumstances of the case.

It is further evident as set forth above, that the trial court properly denied the Defendant's Motion for a New Trial again based upon the Defendant's knowledge and opportunity to appear at trial and his failure to do so. The evidence presented to trial court in a light favorable to the judgment show that there was sufficient evidence, together with the inferences drawn therefrom, to find the Defendant guilty of the charges against him. Nothing in the record or the arguments of the Defendant would show that the court's judgment was clearly erroneous. Finally, the Defendant was properly convicted of the separate offenses of possession or consumption of an alcoholic beverage and misrepresentation of age in order to purchase an alcoholic beverage, based upon the facts presented and the admissions of the Defendant. Therefore, the City respectfully requests that this Court uphold the conviction of the Defendant as found by the trial court.

RESPECTFULLY SUBMITTED this 4 day of September, 1990.



T. W. SHUMWAY
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MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the above and foregoing Brief of Appellee, this 4 day of September, 1990, to Connie L. Mower, P. O. Box 11643, Salt Lake City, Utah 84147-0643.

T. W. Shumway
Attorney for Appellee